الاستناد الى الشهادة في الدعاوي (الشروط ، الصلاحية وأثره على التصويت في المحاكم)

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Citing Testimony in Proceedings (its Terms, Validity, and Impact on Sentence of the Court)

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Abstract

Allegation of testimony has always been one of the reasons in the legal system for proving litigation. However, in countries where there is no need to make the witness to provide allegation of testimony on the one hand and considering the fact that the original principle is the innocence of the denier, testimony has largely lost its performance as a proof.

Under the circumstances considered, allegation of testimony is accepted by the Muslims and its persuation as a great sin. Contrary to Islamic jurisprudence, the Iranian law does not accept the allegation of testimony; however, Western and Arab laws in accordance with Islamic jurisprudence consider testimony refusal as a crime and consider punishments for it .

Key words : Testimony, Witness , Reasons for Proof .

المستخلص

كـان الاسـتناد إلى الشـهادة في الـنظم الحقوقية دائما ولا يزال واحدة من الأسباب لإثبات التقاضي. في الوقت نفسه ، في البلدان التي لا يوجد فيها إلزام إلى الإدلاء بالشهادة من جهة ، ويُرفض كون البراءة مبدأأساسيا، فشـلت الشـهادة إلى حـد كـبير في إثبـات نفسها.مع هذه الشروط تكـون الشهادةعند المسلمىن مبدأ رئيسيا و تعتبر الممانعة منها خطيئة كبرى، هذا و أن قوانين إيران لا تقبل شرط إلزام الشاهد بالشهادة، خلافًا للفقه الإسـلامي، لكـن القـوانين الغربيـة والعربيـة المؤيدة للفقه الإسلامي جعلت الممانعة من الشهادة جريمة وحددت لها عقابا.

الكلمـات المفتاحيـة : الشـهادة ، الشـاهد ، أسباب إثبات الدعاوي .

Introduction:

The most important task of the Islamic ruler after enforcing Islamic law and procedures is to implement judicial judgments and resolve enmity between the people that can delegate it to individuals or the one with high professional standing. Achieving judicial justice in social life that is always accompanied by events, voluntary or involuntary actions of individuals and their family problems are requires admitting testimony. Therefore, in Islam and the various legal systems, testimony is regarded as the cause of proving litigation and the most prominent among them especially with regard to the fact that the basic principle is innocence of the denier, it might cause irreparable damage to society and people.

Testimony :

In legal terms, testimony means announcing the events that is for the benefit of one party and the loss of the other one expressed by a person other than the litigants (Katouzian, 2006, p. 14).

Testimony is one of the oldest methods of proving and symbolizing punishment in the past. There might be no evidence as useful as testimony to prove crimes. Today, testimony has lost its former value and validity and it is a relative reason or statue (Akhundi, 2008, p. 141).

From the religious point of view, taking testimony is one of the private rights of individuals and there is no need to bring witness, although it has been emphasized in such cases as transactions (Zanjani, 2009, p. 386).

However, providing testimony is an obligatory Shari'a and the person who witnessed it should testify if s/he is asked to testify (Zanjani, 2009, p. 387).

In Iran, refusal to testify, especially during the preliminary investigative phase, is not prescribed and it is merely seen as a moral and religious duty to testify (Zanjani, Ashouri, 2007, p. 113).

If the testimony of witnesses is presented as evidence and the witnesses testify, the judicial authority shall hear the testimony of the witness. Article 193 of Criminal Procedure Code while specifying the arrangements for trial in court, emphasizes the need to hear witness statements and the testimony hearing must be qualified and formal so that the presented testimony can be cited as a reason in the criminal case and the verdict.

Legal bases of testimony:

Articles 1306 to 1320 of the Civil Code and Articles 406 to 425 of the Civil Procedure Code relate to testimony. This issue is addressed in the Islamic Penal Code, Article 650.

Witness and its conditions :

The witness may be the objective who describes his or her observations, may be audial that transfers what he has heard or a combination of these two senses whose testimony may require the use of these two. In witnessing, puberty, reason, justice, faith and purity are required. The witnesses should not benefit from litigation and the testimony of the beggars is not accepted.

Puberty:

Witness must be mature. This means that he has reached the age of being able to understand the importance of testimony. Puberty age is 15 lunar years for boys and 9 lunar years for girls. Testimony of children who have not reached this age may be heard for information.

Reason:

In the case of a boy who is 15 years old and a girl who is 9 years old, the principle is to be wise, and if anyone claims to be the opposite, he must prove that the witness is insane.

Faith: The witness must be a Muslim. Justice:

Justice is a spiritual trait that must be arranged in the right order and become well memorized so that one overcomes all his desires and instincts and not commit the major sin. Justice is not destroyed by committing major sins. In this regard, it is not presumed that anyone as a witness is a fair judge; the condition of justice must be proven for the judge.

Purity:

Purity means that the witness is not a bastard and child of adultery.

Not being a beneficiary

The witness should not benefit from the lawsuit himself, but the judge is not responsible to recognize in what cases the person can be a beneficiary. For example, there should not be a close relativity between the witness and the person or the witness should not pursue a case with one of the parties.

Beggary:

A person who begs cannot be described as a witness and his testimony is not accepted. The reason is clear; a beggar is always expecting help and assistance and asks for money. Therefore, his

statements are not reliable because he might give false testimony in exchange for money (Bahrami, 2008, p. 101, 150).

Testimony terms:

It is not enough for the witnesses to have the necessary conditions. Testimony also requires conditions to be effective.

A) Being certain and decisive

Testimony: The testimony of the witness must be certain and decisive. Testimony with doubt is untrustworthy. The witness must be informed of the subject through his senses. Sometimes he testifies about hearing news that the witness is audial.

B) Matching testimony with a lawsuit: If the claim refers to a certain issue but the provisions of the testimony prove another matter, the testimony is ineffective. If the testimony proves a part of claim, it is effective to the same level.

C) The agreement in the meaning of witness testimony: The testimony of witnesses must agree on the meaning of the witness. The words and expressions used by the witnesses are not requires to be the same, but their meaning must be the same. Therefore, if the witnesses testify differently, they will not be effective unless their statements have something in common.

Number of witnesses:

In all countries, the number of witnesses has become less important than the past. The judge can also be convinced by a single witness. The concept that a single witness is not valid is not adopted anymore. In Islamic law, to avoid error, it is agreed that a single witness is not enough; however, the testimony of two men or one man and two women gives justified reasons. In Iranian law, no requirement of number or male status is required; but the judge does not rely on a single testimony to be certain (Safaei, 2004, No. 13).

Withdrawing the testimony

Withdrawing the testimony means that a witness after providing testimony in the court indicates that his or her testimony was inaccurate that led to a mistake in testimony or the witness had a reason to present false testimony. In any case, withdrawing the testimony is the case that the witness takes back his testimony.

1) Withdrawing before a verdict- Where the existence two or more witnesses is credible, in case of withdrawal before issuing a verdict, the ruler should not issue a rule because the verdict is subject to

testimony. If the testimony is lost and the judge does not know if the witnesses were right in their first sentence or in their second sentence; therefore, the truth of their speech is not the case anymore.

2) Withdrawing after the verdict- If the testimony withdrawal is after the verdict, the verdict will not be violated and the witnesses will be the guarantor of the financial compensation. According to the most accurate narration, whether the property is occupied by the one benefiting from testimony or lost, but some jurists have said that if the property is occupied by the one who benefits from testimony, it will be collected and the witnesses are not guarantors.

3) Withdrawing a deliberate testimony- If the testimony withdrawal is after the verdict and the one who a testimony is against him is killed and then the witnesses withdraw the testimony and confess that they deliberately lied, the guarantor of the one who a testimony is against him could ask for their qisas and pay the remaining amount of Diya of their crime. Alternatively, he could ask for qisas for some of them and pay the remaining amount of Diya of their crime and the rest of witnesses would pay their share of crime.

4) Withdrawing an erroneous testimony- If witnesses confess that they made a mistake in testimony, paying Diya will be obligatory for all of them equally. If they differ in deliberate or erroneous testimony, each group will be addressed according to his own confession. That is qisas is proved for the one confessing a deliberate testimony provided that the guarantor of the one who a testimony is against pays the remaining amount of Diya and the share of Diya is proved for the witnesses with erroneous testimony.

5) Withdrawing a divorce testimony- if two witnesses testify divorce and they withdraw after the marriage of the wife with another husband, Sheikh Tousi says that the woman will be returned to the first husband and two witnesses should pay the dowry to the second husband. However, the jurists have stated that the guaranty (witnesses regarding the dowry) in divorce as absolute without distinguishing between revocable and irrevocable divorce. The reason for this divorce is that in both divorces, the reason of voiding the marriage is resulted as a whole especially if the testimony of the witnesses is made after the waiting period of revocable divorce. Thus, reinforcing the dowry on the first husband on both assumptions (revocable and irrevocable divorce) is due and in both

cases the witnesses should pay the dowry to the first husband. However, if there is a difference between revocable and irrevocable divorce, the guaranty refers to the irrevocable divorce. If the witnesses testify about the revocable divorce and then withdraw their witness, there will be no guarantee for dowry of the first husband because nothing has reinforced dowry. That is because at the revocable divorce, the husband has a chance to remove the cause of divorce by referring to the woman and if he does not refer to the woman during the revocable divorce, although the period is passed, the divorce may become irrevocable and witnesses would be the guarantor of the dowry. It may not join the irrevocable divorce because the husband has neglected to refer to his wife.

6) Confirmation of false witnessing- If false witnessing is proved after the verdict, for example the judge becomes aware of their false witnessing rather than their own confession, (confession to false witnessing is withdrawal) the verdict is voided due to the conflict between the two testimonies. Since it is voided, if the object of testimony is a property, it is taken back from the claimant. If it is not possible to recollect the property, the witnesses must pay the damage and the witnesses should pay for anything lost due to their false testimony (Safari, 1989, p. 85).

Conclusion :

There are two issues about testimony in jurisprudence. Enduring and expressing testimony. There are two theories in the necessity of enduring testimony when it is asked from an individual. However, there is no difference in the necessity of witnessing of concealing it in terms of committing a great sin. The reason is the verses of the Quran, traditions of denominations and consensus of the Muslims. However, in Iranian law, unlike jurisprudence and the laws of other countries, there is something else. Article Thirty-eight of the Constitution says: Any kind of torture to confess or obtain information is prohibited and such testimony is not credible. Violation of this principle is punishable by law. Torture for obtaining confession or testimony against oneself is inappropriate in Iranian jurisprudence and law as well as in other countries and such confession is ineffective in some countries' constitutions. This is also stated and condemned by international law and human rights documents. However, compelling to testify in the form of law and withholding penalties is accepted in cases where refusal to testify would impair the

rights of others or impair security in many countries. Islam's goal of sending messengers and books was to establish justice and remove oppression and unfairness among the people. The most important tools to achieve it is testimony that has been put forward as proof in Islam and in different legal systems. However, witnesses to an accident such as a murder that sometimes its procedure takes years and does not lead to the desired outcome have an option to testify and provide important information, Testimony loses all its significance. Therefore, forcing to testify in Iranian law must also be legal in order to restore the rights of the people and society. Article 38 of the Constitution cannot prevent this issue in any case because there are just two solutions in this regard. It is possible to either act based in the Article 38 and oppose the Article 4 of the Constitution overlooking other principle or prioritize Article 4 of the Constitution to the Article 38 and make a conclusion between Shari'a and Article 4 on the one hand, and Article 38 of the Constitution on the other hand that the second option should be chosen.

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